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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

MICHAEL C. MAVE, *Petitioner*,

vs.

STATE OF WASHINGTON, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION

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ARGUMENT

1.

POWER OF THE STATE TO REGULATE ITS PROCEDURES

The lower court's instructions given to the jury and their affirmance by the Supreme Court of the State of Washington does not warrant a review by this Court on certiorari. There is no Federal question of substance involved which is in any way in conflict with State or Federal law, nor has the State court departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

> "It is of course within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, 'unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder v Massachusetts, 291 US 97, 105, 78 L ed 674, 677, 54 S Ct 330, 90 ALR 575."
> *Speiser v Randall,* 357 U. S. 513, 2 L. Ed. 2d 1460, 78 S. Ct. 1332.

> "Normally, the admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented. The role of a federal habeas corpus petition is not to serve as an additional appeal."
> *Grundler v. State of North Carolina,* 283, F. 2d 798, 802 (1960).

"As there is a presumption of constitutional regularity in state judicial proceedings, petitioner must show that the State so departed from constitutional requirements as to justify a federal court's intervention to protect his rights. Darr v. Burford, supra; Daniels v. Allen, 1953, 344 U. S. 443, 73 S Ct. 397, 437, 97 L. Ed 469."
Davis v. State of North Carolina, 196 F. Supp. 488, 492 (1961)

"If the presumption is not unreasonable and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 43, 31 S. Ct. 136, 55 L. Ed. 78, 32 L.R.A. (N.S.) 226, Ann. Cas. 1912A, 463. A Prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Bailey v. Alabama, 219 U. S. 219, 233, et seq., 31 S. Ct. 145, 55 L. Ed. 191."
Manley v. State of Georgia, 49 S. Ct. 215, 217.

The giving of the three instructions on presumption was not arbitrary, nor did they operate to deny the Petitioner an opportunity to repel them. They did not violate the due process clause of the Fourteenth Amendment.

2.

PRESUMPTIONS GIVEN CONSTITUTE RULES OF LAW IN THE STATE OF WASHINGTON

Presumptions are generally grouped into two major

classes: (1) of law; and (2) of fact. The former usually have the force of legal maxims and become rules of law, with definite procedural consequences. *Watkins v. Prudential Ins. Co.*, 315 Pa. 497, 173 A. 644. They arise as follows: (1) a procedural expedient, or (2) a rule of proof production based upon comparative availablility of material evidence to the respective parties, or (3) a conclusion firmly based upon the generally known results of wide human experience, or (4) a combination of (1) and (3). *Watkins v. Prudential Ins. Co.*, supra.

A true presumption is a rule of law. It is not a fact itself nor an inference thereof, but the legal consequence attaching to such a fact. It is a rule of law that from given circumstances a certain inference may be drawn. It stands until overcome in the jury's mind by a preponderance of the evidence to the contrary. It is a working hypothesis which works to shift the burden to the party against whom it operates, thus satisfying the jury that the presumed inference is untrue. The issue is entirely for the jury. A true presumption, that is, a presumption of law, is rebuttable and is for the jury. *Watkins v. Prudential Ins. Co.*, supra.

Wigmore discusses a presumption thus:

"So far as 'presumption' means anything for the present purpose it signifies a ruling as to the duty of producing evidence. The function of a presumption," he says, is "to cast

upon the opponent the duty of producing evidence." Further: "A presumption, as already noticed, is in its characteristic feature a *rule of law* laid down by the judge, and attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent." "It must be kept in mind," Wigmore continued, "that the peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent." *Wigmore on Evidence, Third Edition, Section 2487, 2494.*

Regardless of theoretical analysis by textbook writers and court cases to the contrary, the Washington courts have required instructions on presumption in certain instances, particularly criminal cases. *State v. Tyree*, 143 Wash. 313, 255 Pac. 382; *State v. Mayo*, 42 Wash. 540, 85 Pac. 25. So far as a presumption means anything in the State of Washington it signifies a ruling as to the duty of producing evidence. A true presumption as given in the three instructions in the instant case merely invokes a rule of law compelling the jury to reach a conclusion in the absence of evidence to the contrary.

The following Washington cases sustained this rule:

State v. Moore, 61 Wn. (2d) 165, 377 P. (2d) 456;

State v. Collins, 50 Wn. (2d) 740, 314 P. (2d) 660;

State v. Thomas, 63 Wn. (2d) 59, 385 P. (2d) 532;

State v. Putzell, 40 Wn. (2d) 174, 242 P. (2d) 180;

State v. Hartley, 25 Wn. (2d) 211, 170 P. (2d) 333;

State v. Clark, 34 Wash. 485, 76 Pac. 98;

State v. Harris, 74 Wash. 60, 132 Pac. 735.

3.

PRESUMPTION OF SECOND DEGREE MURDER

Petitioner states in his Petition that a lack of uniformity among the 50 states creates a serious problem in the administration of criminal justice, that it is patently unfair and violates due process to make geography a factor in a homicide case. He states that approximately 15 of the 50 states, including the State of Washington, hold that once a killing has been established the act is second degree murder.

The Petitioner has eliminated from his statement the word "felonious". The giving of this instruction is not unfair and does not violate due process, nor does it make geography a factor in a homicide case. All homicides do not constitute murder but all murders of course do constitute homicide in the State of Washington. Before the presumption of second degree murder is given a "felonious killing" must be established by the state. This is murder in the State of Washington.

At common law the crime of murder was not divided into degrees. The statutes in various states either have adopted the common law definition of murder or have divided murder into two or more degrees for the purpose of adjusting the punishment. Thus we find a wide variance among the states defining murder. Again punishment upon the conviction of murder is not uniform in the various states.

The legislature of the State of Washington divided murder into first and second degrees. In cases other than specified as first or second degree murder a homicide not being excusable or justifiable is manslaughter under our statute. Generally, however, in the 15 states when a "felonious killing" of a human being has been established by the state it is presumed to be murder in the second degree, the lowest degree of murder as defined in those states.

This court on occasion has denied certiorari in cases arising in those states where this presumption of second degree murder has been denied.

> "When the State has established by the requisite proof the corpus delicti the presumption is that it is murder of the second degree. If the State would elevate the offense to murder of the first degree, the State must establish the characteristics of that crime and conversely, if the prisoner would reduce it to manslaughter or justifiable homicide the burden of proof rests upon him. State v. Morrison, 49 W. Va. 210, 38

S.E. 481; State v. Douglas, 28 W. Va. 297; State v. Cain, 20 W. Va. 679."
State v. Stevenson, 127 S. E. 2d 638, 641 Cert. Den. 83 S. Ct. 886, 372 U. S. 938, 9 L. Ed. (2d) 768.

"An unlawful homicide is presumed to be murder in the second degree. The burden is then the State's to prove facts which elevate the offense to murder in the first degree. State v. Williams, 29 N. J. 27, 44, 148 A. 2d 22 (1959)."
State v. DiPaolo, 168 A. 2d 401, 409, Cert. den. 82 S. Ct. 130, 368 U. S. 880.

4.

PRESUMPTION THAT ONE IS PRESUMED TO INTEND THE NATURAL AND NECESSARY RESULTS OF HIS ACTION

Years before the Payne case (*State v. Payne*, 10 Wash. 545, 39 Pac. 157 (1895), this Court in *Toof v. Martin*, 13 Wall. 40-51, 20 L. Ed. 481 (1871) stated:

"It is a general principle that everyone must be presumed to intend the necessary consequences of his acts."

In 1896 this court affirmed in a murder case the following instruction:

"The 6th assignment is to the following language: 'The law says we have no power to ascertain the certain condition of a man's mind. The best we can do is to infer it more or less satisfactorily from his acts. A man who performs an act which it is known will pro-

duce a particular result is from our common experience presumed to have anticipated that result and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is commited by weapons indicating design, that it is not necessary to prove that such design existed for any definite period before the fatal blow was fired. From the very fact that a fatal bullet was fired, we have the right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant.'

"This is nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act. 1 Greenl. Ev. §18; Reg. v. Jones, 9 Car. & P. 258; Reg. v. Hill, 8 Car. & P. 274; Reg. v. Beard, 8 Car. & P. 143; People v. Herrick, 13 Wend. 87, 91."
Allen v. United States, 164 U. S. 492, 17 S. Ct. 154.

Again in the same year this court affirmed the instruction in a bankruptcy case, said instruction being as follows:

"The law presumes that every man intends the legitimate consequence of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action."
Agnew v. United States, 165 U. S. 36, 17 S. Ct. 235, 40 L. Ed. 624.

To the same effect see *United States vs. Patten*, 226 U. S. 525, 539, 57 L. Ed. 333, 340, 33 S. Ct. 141; *Nash vs. U. S.*, 229 U. S. 373, 376, 57 L. Ed. 1232, 1235, 33 S. Ct. 780.

> "Since intent must be inferred from conduct of some sort, we think it is permissible to draw usual reasonable inferences as to intent from the overt acts. The law of treason, like the law of lesser crimes, assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts." *Cramer v. United States*, 325 U. S. 1, 89 L. Ed. 1441, 1459, 65 S. Ct. 918, 933.

> "This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the commonlaw rule that a man is held to intend the foreseeable consequences of his conduct. Cramer v. United States, 325 US 1, 31, 89 L ed 1441, 1459, 65 S Ct. 918; Nash v. United States, 229 US 373, 376, 57 L ed 1232, 1235, 33 S Ct 780; United States v. Patten, 226 US 525, 539, 57 L ed 333, 340, 33 S Ct 141, 44 LRA NS 325; Agnew v. United States, 165 US 36, 50, 41 L ed 624, 629, 17 S Ct 235." *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17, 98 L. Ed. 455, 74 S. Ct. 323, 41 A. L. R. 2d 621.

5.

PRESUMPTION OF MENTAL RESPONSIBILITY

Instructions No. 15 and No. 19, stating that every man is presumed to be mentally responsible, was a correct statement of the law, does not violate the due process clause of the Fourteenth Amendment of the United States Constitution and was not a comment upon the evidence.

A plea of mental irresponsibility under our statutes is a special plea interposed by the defense (Appendix B, page 19. R. C. W. 10.76.020). Proof of mental irresponsibility rest upon he who asserts it, not the State of Washington in the first instance. When evidence is once introduced, however, the duty of going forward with the evidence to rebut evidence of mental irresponsibility, and the ultimate burden of persuasion rests with the State. This the State did by calling Dr. Berg in rebuttal. (See *State v. Mays*, Petitioner's Petition, Appendix A, page 16). The State met the test as set forth in *Davis v. United States*, 160 U. S. 469, 40 L. Ed. 499, 16 S. Ct. 353.

> "In Davis v. United States, 1895, 160 U. S. 469, 486-488, 16 S. Ct. 353, 40 L. Ed. 499, it was settled that when lack of mental capacity was raised as a defense to a criminal charge the law presumes that all persons are 'sane' or in sound mental health but when some evidence of mental disorder is introduced, the prevailing rule in most jurisdictions is that sanity, like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt. Leland v. Oregon, 1952, 343 U. S. 790, 797, 72 S. Ct. 1002, 96 L. Ed. 1302. See also Tatum v. United States, 1951, 88 U. S. App. D. C. 386, 190 F. 2d 612, Fitts v. United States, 10 Cir., 1960, 284 F 2d 108."
> *United States v. Currens*, 290 F. 2d 751 (1961).

In *Hotema v. United States* the following portion of an instruction was considered by this Court:

"Every person charged with crime is presumed to be

> sane, that is, of sound memory and discretion until the contrary is shown by proof."

This Court held that the instruction was correct. *Hotema v. United States,* (1902) 22 S. Ct. Reporter 895, 896.

As late as 1961 the Federal Courts have recognized a presumption in favor of defendant's sanity. *Dusky v. United States,* 295 F. 2d 743, 745 (1961).

In *Allen v. United States,* 164 U. S. 492, 495, in considering as assignment of error to the following language:

> "The law says we have no power to ascertain the certain condition of a man's mind. The best we can do is to infer it more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which it is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, that it is not necessary to prove that such design existed for any definite period before that fatal blow was fired. From the very fact of a blow being struck, from the very fact that a fatal bullet was fired, we have the right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant."

this Court said:

> "This is nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act. 1 Greenl. Ev. §18; Reg. v. Jones, 9 Car. & P. 258; Reg. v. Hill, 8 Car. & P. 274; Reg. v. Beard, 8 Car. & P. 143;

People v. Herrick, 13 Wend. 87, 91; Allen v. United States, 164 U. S. 492-495. See also Agnew v. United States, 165 U. S. 36, 17 S. Ct. 235, 41 L. Ed. 625."

6.

CASES CITED BY PETITIONER REFER TO CONCLUSIVE PRESUMPTIONS

The presumption used in *Morrissette v. United States,* 342 U. S. 246 (1952) — a case relied on heavily by Petitioner — has no bearing in the instant case. The Presumption discussed in Morrissette was a conclusive one. The presumption in Instruction No. 15 in the instant case is rebuttable.

The Court in *Chase v. Beard,* 55 Wn. (2d) 58, 346 Pac. 2d 315 (1959) referred to in Petitioner's Petition, drew a distinction between permissive inferences and mandatory presumptions, holding that res ipsa loquitur (inference of negligence) is merely a permissive inference which requires no instruction to the jury. In *McKinney v. Frodsham,* 57 Wash. (2d) 126, 356 Pac. 2d 100 (1960) the Court indicated that such instruction on res ipsa would not be erroneous or forbidden given in a proper case, even though unnecessary. Res ipsa cases deal with permissive inferences, not with true presumptions.

An analysis of the remaining cases submitted by Petitioner on the question of presumptions are generally conclusive or permissive presumptions, not true or rebuttable presumptions.

7.

NO SUBSTANTIAL FEDERAL QUESTION INVOLVED OR VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

We have set forth in Appendix A Instructions 7, 8, 10A, 16, 20 and 31 given by the lower court in the instant case. These instructions required the State to prove all the elements of the crime charged beyond a reasonable doubt. The instructions in reference to presumptions in no way relieved the State of its responsibility so far as proof was concerned. Instruction No. 31 advised the jury that it was impossible to embody all the law in one instruction. Each instruction must be considered in connection with the others. There was no exception taken to any of the instructions given other than the questions relative to presumptions. The issue is one of state law only. It in no way involves any substantial Federal question. It does not violate the rule of fair play. They in no way violate the due process clause of the Fourteenth Amendment.

CONCLUSION

According to the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

COURT'S INSTRUCTIONS REQUIRING STATE TO PRODUCE EVIDENCE IN ORDER TO CONVICT

ELEMENTS OF FIRST DEGREE MURDER
INSTRUCTION NO. 7

Before you can convict the defendant of the crime of murder in the first degree as charged in the Information, the state must convince you beyond a reasonable doubt of the truth of each and all of the following elements:

(1) That Denise Ann Mays was shot and killed on or about the 2nd day of February, 1963.

(2) That she was shot and killed in Yakima County, Washington.

(3) Tha. the shooting was done willfully, intentionally, feloniously and with malice by Michael C. Mays.

(4) That the shooting, not being either excusable or justifiable, was done with a premeditated design to effect the death of Denise Ann Mays.

ELEMENTS OF SECOND DEGREE MURDER
INSTRUCTION NO. 8

Included within the crime alleged in the Information is the lesser offense of Murder in the Second Degree. If you find the defendant is not guilty of the crime of Murder

in the First Degree as alleged in the Information, you must then determine whether he is guilty of Murder in the Second Degree.

To convict the defendant of the crime of Murder in the Second Degree, you must be convinced by legal and competent evidence beyond a reasonable doubt that:

(1) That Denise Ann Mays was shot and killed on or about the 2nd day of February, 1963;

(2) That she was shot and killed in Yakima County, Washington;

(3) That the shooting was done wilfully, intentionally, feloniously and with malice by Michael C. Mays.

(4) That the killing was committed with a design by the defendant to effect the death of the person killed but without premeditation.

PREMEDITATED DESIGN AND DELIBERATION INSTRUCTION NO. 10-A

You are instructed that the burden is on the State with respect to its charge of first degree murder to prove beyond a reasonable doubt that the defendant effected the death of the person killed with a premeditated design to effect that death. You are instructed that this statute introduces the element of deliberation as one of the elements which must be proven by the State beyond a reasonable doubt. While no great amount of time necessarily intervenes between the intention to kill and the act of killing,

yet, under this statute there must be time enough to deliberate, and no deliberation can be instantaneous. Deliberation means to weigh in the mind, to consider the reasons for and against, and consider maturely, to reflect upon.

So you are instructed that if the State has failed to prove beyond a reasonable doubt the necessary element of deliberation in this case, then you must find the defendant not guilty of the charge of first degree murder.

CONVICTION ON LOWER DEGREE
INSTRUCTION NO. 16

With reference to the charge in the Information, you are instructed that every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt, and when an offense has been proved against him and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lower.

LAW APPLICABLE TO THE PLEA OF MENTAL IRRESPONSIBILITY
INSTRUCTION NO. 20

It is the law in the State of Washington, that no mentally irresponsible man can be guilty of a crime and hence cannot be punished for what would otherwise be

a crime. The ground for this exception to criminal responsibility is, that there must be a criminal intent, in order that the act may constitute a crime, and that a mentally irresponsible person cannot do an intentional wrong. Mental irresponsibility, when it is proven to have existed at the time when the offense was committed, constitutes a good defense, and the defendant is entitled to acquittal. Mental responsibility is essential to intent.

IMPOSSIBLE TO EMBODY ALL LAW IN ONE INSTRUCTION

INSTRUCTION NO. 31

It is impossible to embody all the law in one instruction. In considering each instruction you must construe it in connection with the others and apply the principles thereof to the evidence before you.

APPENDIX B

R. C. W. 10.76.020 PLEADING INSANITY. When it is desired to interpose the defense of insanity or mental irresponsibility on behalf of one charged with a crime, the defendant, his counsel or other person authorized by law to appear and act for him, shall at the time of pleading to the information or indictment file a plea in writing in addition to the plea or pleas required or permitted by other laws than this, setting up (1) his insanity or mental irresponsibility at the time of the commission of the crime charged, and (2) whether the insanity or mental irresponsibility still exists, or (3) whether the defendant has become sane or mentally responsible between the time of the commission of the crime and the time of the trial. The plea may be interposed at any time thereafter, before the submission of the cause to the jury, if it be proven that the insanity or mental irresponsibility of the defendant at the time of the crime was not before known to any person authorized to interpose a plea. [1907 c 30 § 2; RRS § 2174.]

APPENDIX C

R. C. W. 4.04.010 EXTENT TO WHICH COMMON LAW PREVAILS. The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state. [1891 c 17 § 1; Code 1881 § 1; 1877 p 3 § 1; 1862 p 83 § 1; RRS § 143.]

R. C. W. 9.01.150. COMMON LAW TO SUPPLEMENT STATUTE. The provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the institutions and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the superior courts of this state. [1909 c 249 § 47; Code 1881 § 1; RRS § 2299.]